



BRB No. 16-0189

RUSSELL E. BRAUN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: <u>Aug. 25, 2016</u>
U. S. BARGE, L.L.C.	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE	)	
COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Order Awarding Attorney's Fees and Costs and the Order Denying Reconsideration on Fees of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz (The Law Office of Charles Robinowitz), Portland, Oregon, for claimant.

Norman Cole (Sather, Byerly & Holloway, L.L.P.), Portland, Oregon, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Awarding Attorney's Fees and Costs and the Order Denying Reconsideration on Fees (2012-LHC-01747) of Administrative Law Judge Steven B. Berlin rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act).

The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, based on an abuse of discretion, or not in accordance with law. *Tahara v. Matson Terminals, Inc.*, 511 F.3d

950, 41 BRBS 53(CRT) (9th Cir. 2007).

Claimant and employer reached a Section 8(i), 33 U.S.C. §908(i), settlement in July 2014, resulting in a payment to claimant of \$30,000 for injuries he suffered while working for employer. On August 18, 2014, claimant's counsel filed a petition for an attorney's fee for work performed before the administrative law judge in 2013 and 2014. He requested a fee of \$68,285.40, representing attorney time at an hourly rate of \$450, associate attorney time at an hourly rate of \$225, and paralegal time at an hourly rate of \$165. In addition, he requested reimbursement of \$17,091.90 in costs. Employer filed objections, challenging as excessive the requested amount of time and hourly rate for attorney services and the requested costs for the vocational expert.

The administrative law judge, discussing some of counsel's hourly rate history before the Office of Administrative Law Judges, the Board, and the United States Court of Appeals for the Ninth Circuit, and citing prior fee decisions, awarded counsel an attorney's fee using as a basis an hourly rate of \$340 for work performed in 2011. Stating that the work herein was performed in Portland, Oregon, in 2013 and 2014, the administrative law judge adjusted the base rate using increases in Portland's Consumer Price Index (Urban) and awarded counsel hourly rates of \$359 and \$367, respectively. Order at 2-5. He awarded paralegal services at an hourly rate of \$150, and he reduced the total requested hours by 2.8. *Id.* at 5-6. Of the over \$15,000 requested in costs for services of the vocational expert, Mr. Stipe, the administrative law judge disallowed \$6,000. Therefore, the administrative law judge awarded a total fee and costs of \$51,667.65, representing \$1,676.25 for associate attorney services, \$322.50 for paralegal services, \$38,577 for counsel's services, and \$11,091.90 in expenses. Order at 11. The administrative law judge denied employer's motion for reconsideration. Claimant's counsel appeals the administrative law judge's fee award, challenging the awarded hourly rate, the absence of a delay enhancement, and the disallowance of \$6,000 for the vocational expert's services.<sup>1</sup> Employer responds, urging affirmance. Counsel has filed a reply brief.

The Supreme Court has held that the lodestar method, in which the number of hours reasonably expended in preparing and litigating the case is multiplied by a reasonable hourly rate, presumptively represents a "reasonable attorney's fee" under a federal fee-shifting statute, such as the Longshore Act. *See Perdue v. Kenny A.*, 559 U.S. 542 (2010); *City of Burlington v. Dague*, 505 U.S. 557 (1992); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986); *Blum v. Stenson*, 465 U.S. 886 (1984). The Court has also held that an attorney's reasonable hourly rate is "to be

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<sup>1</sup> As no party challenges the hours approved and the fees awarded for associate attorney and paralegal services, they are affirmed. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

calculated according to the prevailing market rates in the relevant community.” *Blum*, 465 U.S. at 895; *see also Kenny A.*, 559 U.S. at 551. The burden falls on the fee applicant to produce satisfactory evidence that the requested hourly rates are in line with those prevailing in the relevant community for similar services by lawyers of comparable skill, experience, and reputation. *Shirrod v. Director, OWCP*, 809 F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 2015); *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009); *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009).

Counsel first challenges the administrative law judge’s awarded hourly rates of \$359 and \$367, asserting that, in light of *Shirrod*, the administrative law judge’s adoption of the \$340 base figure was incorrect. Upon finding that counsel did not satisfy his burden of showing a community prevailing hourly rate of \$450, the administrative law judge identified several prior longshore cases which influenced his hourly rate award. Order at 3 n.4-6.

In *Shirrod*, the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, reiterated that, in awarding a fee under the Act, an administrative law judge must define the relevant community and consider market rate information tailored to that market. *Shirrod*, 809 F.3d at 1089, 49 BRBS at 96-97(CRT). Consequently, the court vacated the Board’s affirmance of the administrative law judge’s fee award in that case, concluding it was erroneous because, even after finding the relevant community to be Portland, the administrative law judge awarded an hourly rate based on state-wide rate information rather than on rate information tailored to the Portland community. The Ninth Circuit held that, when the relevant market is identified as Portland, as here, the results of the Oregon Bar Survey should be addressed when setting a proxy hourly rate because it provides information on attorney fees specific to Portland. *Id.* Additionally, unless proven otherwise, reported rates for state workers’ compensation attorneys are not representative of a market rate and cannot be used to determine a proxy market rate for attorneys under the Longshore Act because rates for Oregon workers’ compensation attorneys may be capped by state law and, thus, are artificially low. *Id.*, 809 F.3d at 1092, 49 BRBS at 98-99(CRT); *Christensen v. Stevedoring Services of America*, 44 BRBS 39, 40, *recon. denied*, 44 BRBS 75 (2010), *aff’d mem. sub nom. Stevedoring Services of America, Inc. v. Director, OWCP*, 445 F.App’x 912 (9th Cir. 2011). The administrative law judge relied on *Castillo v. Sundial Marine Tug & Barge*, 2010-LHC-00341 (March 26, 2013), *aff’d in part, part, BRB No. 13-0356* (April 24, 2014), and *Wilson v. Honeywell Technology Solutions, Inc.*, 2010-LDA-00074 (June 29, 2011), *aff’d*, BRB No. 11-0762 (June 15, 2012), to arrive at the \$340 base hourly rate. These cases include in their calculations of counsel’s hourly rate the consideration of factors such as state-wide rates and workers’ compensation rates, which have now been rejected in *Shirrod*. Therefore, pursuant to *Shirrod*, we must vacate the fee award, and we remand this case for the administrative law judge to award

counsel a fee for services based on a market rate for the Portland, Oregon, community.<sup>2</sup>

Counsel next contends the administrative law judge erred in disallowing \$6,000 of the over \$15,000 requested in costs for the services of the vocational expert. Section 28(d) of the Act, 33 U.S.C. §928(d), provides that “the reasonableness of the fees of expert witnesses must be approved by the hearing officer,” i.e., the administrative law judge. *See generally Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff’d*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *see also Zeigler Coal Co. v. Director, OWCP*, 326 F.3d 894 (7th Cir. 2003); 20 C.F.R. §702.135. Employer objected to the cost of the expert’s bill, contending it was excessive and making specific objections to certain items on the bill. The administrative law judge explained, in four pages, why the requested charges for 75 hours of work by the vocational expert were not reasonable. Specifically, he explained that Mr. Stipes’s work was unfocused and that he misunderstood his function as he engaged in unnecessary activities, such as searching for matches to the closest work claimant had been performing, assessing what jobs might give claimant the most satisfaction, and contacting employers whose jobs had been withdrawn by employer’s expert as being unsuitable for claimant. Order at 6-10; *see also Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010) (a claimant’s preferences are not a factor in determining whether a job is suitable). The administrative law judge stated that Mr. Stipes’s role should have been better defined by counsel, noting that Mr. Stipes engaged in an assessment of claimant’s psychological state, which he was not qualified to do. While his disallowances exceeded employer’s specific objections, the administrative law judge fully explained his rationale and counsel has not established that the administrative law judge abused his discretion in reducing the expert witness fee in this case. Therefore, we affirm the reduction of costs related to the vocational expert’s services. *See generally Tahara*, 511 F.3d 950, 41 BRBS 53(CRT).

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<sup>2</sup> As counsel did not raise his entitlement to a delay enhancement before the administrative law judge, we need not consider his contention in this regard. *D.V. [Van Skike] v. Cenex Harvest States Cooperative*, 41 BRBS 84 (2007), *aff’d in part and vacated on other grounds sub nom. Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9<sup>th</sup> Cir. 2009); *see also Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009) (two-year delay is “ordinary” and does not require enhancement); *cf. Modar v. Maritime Services Corp.*, 632 F.App’x 909, 49 BRBS 91(CRT) (9<sup>th</sup> Cir. 2015), *vacating* BRB No. 13-0319 (Jan. 17, 2014).

Accordingly, we vacate the administrative law judge's award of hourly rates of \$359 and \$367 for attorney services, and we remand the case for reconsideration of this issue in accordance with this decision. In all other respects, the administrative law judge's Order Awarding Attorney's Fees and Costs and Order Denying Reconsideration on Fees are affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge

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RYAN GILLIGAN  
Administrative Appeals Judge